Supreme Court of the United States

October Term 1945.

No. 566

LANSBURGH & BRO., a Corporation, *Petitioner*,

v.

DORIS E. DEFFEBACH, *Respondent*.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA.

AUSTIN F. CANFIELD,
EUGENE YOUNG,
Attorneys for Petitioner.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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CITATIONS.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA.

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

The petitioner, Lansburgh & Bro., a corporation, in support of this petition for a writ of certiorari to be directed to the United States Court of Appeals for the District of Columbia, to review a judgment entered therein on the third day of September, 1945, respectfully shows:

SUMMARY STATEMENT OF THE CASE.

This is a civil action instituted in the District Court of the United States for the District of Columbia, by the respondent, Doris E. Deffebach. She seeks to recover dam-

ages for personal injuries suffered by her on the 17th day of January, 1942, as the result of the burning of a chenille robe then being worn by her, which she had two weeks previously purchased from petitioner, the operator of a department store in the District of Columbia. The respondent pitched her claim upon a breach of implied warranty on the part of petitioner and expressly rejected any claim of right to recover under the laws of negligence, both in her complaint, in the pretrial order, and during the progress of the trial.

It appears from the record that on January 3, 1942, the respondent, forty-four years of age, and a law school graduate, was shopping for lounging robes. She had purchased one at the Hecht Company and then went to the basement in petitioner's store and purchased "a blue sort of Copenhagen blue chenille robe with a soft nap or pile or design of robe and it was a coat style robe." The robe when worn, folded over the right side into strings which were tied, then the outside flap folded over and was tied with a short sash which had to be tied into a double knot to secure it. Respondent wore the robe a couple of times between the date of its purchase on January 3, 1942, and the date of the accident on January 17, 1942. It had not been laundered or cleaned.

At the time of the purchase of the robe, it was on display with others on a rack in petitioner's store. Respondent tried on various robes. No salesgirl waited on her. She finally selected the robe in question and took it over to the salesgirl, had it wrapped up and took it home. She testified that she was familiar with chenille and up until the night of the accident "she had used the robe as an ordinary robe would be used." On Saturday afternoon, January 17, 1942, respondent was home with a cold. Friends called upon her and she and they had drinks of whiskey which was furnished by one of the guests. They then went out to dinner and returned to the respondent's apartment and discussed matters incident to law school activities. During this time further drinks were served. Late in the evening, as the guests were leaving, respondent invited a female friend to

spend the night with her. At this time the respondent, wearing the robe, lighted a cigarette, after which she attempted to flick the match out by a downward fanning or waving of the lighted match, while engaged in conversation with the guests. She did not succeed in fanning out the match flame but on the other hand brought it into contact with the robe which took fire immediately. The flames shot up to the left shoulder and part of the back. The guests attempted to beat the flames out with their hands but were unsuccessful and then knocked the respondent to the floor and finally smothered the flames. The robe was exhibited to the jury. The respondent was badly burned and was hospitalized, requiring medical care for considerable time after the occurrence.

At the end of respondent's case, petitioner's counsel moved for a directed verdict pointing out that the robe in question was an ordinary cotton garment; that there was no testimony in the record to show that the cloth had been treated or impregnated with chemicals or inflammable materials, and that the respondent, having had ample opportunity to do so, had made a careful examination of the robe before purchase and, there being no evidence of any hidden or latent defects, respondent could not recover; also, that respondent could not recover under the statute invoked. The court directed a verdict and in doing so delivered the following opinion.

> "The Court (Bailey, J.): Members of the Jury, this suit is a suit on what is called an implied warranty; that is where anyone purchases goods, the seller implies that those goods are reasonable and suitable for the purpose for which they are bought. The law, however, provides that if the buyer has examined the goods, there is no implied warranty as regards the effect which such examination ought to have revealed.
>
> Now, there is no claim here, no evidence, that there was any chemical or other material impregnated in this garment that would not appear on the surface. It was simply a garment, which you might say was fuzzy on

its surface, and one which might burn more freely than a garment of open material.

So that, under the law, I think there is no implied warranty, and I will give you that order, to return a verdict for the defendant."

An appeal was taken from the judgment on the verdict so directed, to the United States Court of Appeals for the District of Columbia. In that court it was argued before, and the opinion was that of three of the six Justices authorized for that court, namely Justices Edgerton, Miller and Arnold. Chief Justice Groner and Justice Stephen did not participate in the hearing or decision. There was one vacancy in the Court.

The Court of Appeals on June 29, 1945, reversed the judgment of the trial court and handed down its opinion, which is published in 150 Fed. 2d 591. Petitioner filed a petition for re-hearing or modification of the opinion and a petition for consideration of petition for re-hearing or modification by entire court, Justice Arnold having resigned on the 9th day of July, 1945, and Justice Miller having resigned, effective October 1, 1945, and then on vacation and not active on behalf of the Court, which petition and motion were overruled on September 3, 1945.

QUESTIONS OF LAW PRESENTED.

1. An interpretation of Title 28, Section 1115 D. C. Code of 1940.
2. Does the opinion of the United States Court of Appeals for the District of Columbia deprive petitioner of the right to have important issues of fact settled by a jury upon a re-trial of this case?
3. Is the opinion of the United States Circuit Court of Appeals in interpreting the statute (Uniform Sales Act) in conflict with the almost uniform weight of authority?
4. Rehearing by full Bench.

JURISDICTION.

Jurisdiction is invoked under Section 240(a) of the Judicial Code as amended by the Act of February 13, 1925 (43 Stat. 936) United States Code and Rule 38 of the revised rules of this Court, in particular Subdivision 5 thereof.

STATUTES INVOLVED.

The only Statute involved and pertinent to a decision in this case is the following:

> D. C. Code 1940, Title 28, Section 1115. "Subject to the provisions of chapters 11-16 of this title and of any statute in that behalf, there is no implied warranty or condition as to the quality or fitness for any particular purpose of goods supplied under a contract to sell or a sale, except as follows:
>
> Where the buyer, expressly or by implication, makes known to the seller the particular purpose for which the goods are required, and it appears that the buyer relies on the seller's skill or judgment (whether he be the grower or manufacturer or not), there is an implied warranty that the goods shall be reasonably fit for such purpose. * * *
>
> If the buyer has examined the goods, there is no implied warranty as regards defects which such examination ought to have revealed. * * * (Mar. 17, 1937, 50 Stat. 32, ch. 43, §15.)"

REASONS RELIED UPON FOR ALLOWANCE OF THE WRIT.

1. The questions here presented are based upon the apparent conflict between the ruling of the United States Court of Appeals for the District of Columbia and other State and Federal decisions interpreting the Uniform Sales Act.

2. The opinion of the United States Court of Appeals for the District of Columbia seemingly deprives petitioner of its right to trial by jury of important issues of fact in the event of a re-trial of the case.

3. Petitioner is entitled, as a matter of right, to have its motion for re-hearing heard and determined by members of the Court duly qualified to sit thereon.

WHEREFORE, petitioner respectfully prays the allowance of a writ of certiorari to the United States Court of Appeals for the District of Columbia to the end that the record in said cause may be removed to this Honorable Court and that the errors complained of may be examined and corrected and said judgment reversed.

Respectfully submitted,

AUSTIN F. CANFIELD,
EUGENE YOUNG,
Attorneys for Petitioner.